

Virginia Racing Commission

MINUTES

OF THE

COMMISSION MEETING

June 17, 2009

**HORSEMEN'S BUILDING
COLONIAL DOWNS
10700 HORSEMEN'S ROAD
NEW KENT, VA**

In Attendance

Commission Members

Peter C. Burnett, Chairman
Clinton Miller, Vice-Chairman
Mark T. Brown
David C. Reynolds

Commission Staff:

Victor I. Harrison, Executive Secretary
David S. Lermond, Jr., Deputy Executive Secretary
Kimberly M. Carter, Office Administrator
C. Richard Harden, DVM, Commission Veterinarian
Joseph M. Roney, Director of Operations & Enforcement
Dennis E. West, Director of Operations

Attorney General's Office:

Amy K. Dilworth
Frank S. Ferguson

At 9:40 a.m., the regular monthly meeting of the Commission was called to order by Chairman Burnett.

The minutes of the May 20, 2009 meeting were approved unanimously.

During Commissioners Comments, Chairman Burnett presented a resolution in respect and remembrance of Bill Passmore to Jean Chalk on behalf of the Passmore family. The resolution states as follows:

WHEREAS, **William Passmore**, a resident of Maryland, who died on the 14th day of May 2009, at the age of 76 years, was a life-long contributor to the sport of horse racing; having spent 38 years as a successful and honored jockey, winning 3,531 races with purses accumulating over \$23 million dollars in purse money; and

WHEREAS, he also served 20 years as a Racing Steward, including 11 years as a Steward at the Colonial Downs Racetrack in the Commonwealth of Virginia; and

WHEREAS, during his career as a jockey, and after his retirement, he served as a mentor and tutor to younger jockeys and established himself as an appropriate role model in the sport; and

WHEREAS, as a jockey and Steward, he always supported and promoted safe and sound horsemanship; and

WHEREAS, Bill always exhibited a gracious sense of humor, and maintained a dignity that earned the respect and admiration of fans, and of his associates, personal and professional, as a true gentleman;

BE IT RESOLVED by the Virginia Racing Commission that, due to all of the above, and more , we do hereby honor **William Passmore**, and express our thanks and appreciation for all his contributions to our efforts to sustain a viable sport of horse racing and the horse industry in Virginia; and we commend him by this resolution as being an honorary Virginian who will be truly missed by all of us; and we express our deepest sympathy and condolences to his wife Charlene and his seven children and their families on the great loss of this wonderful gentleman, whose memory is cherished by all here in the Commonwealth of Virginia who came to know him during his exemplary career.

During the Executive Secretary's report, Mr. Harrison commented on the beginning of the meet in particular the good work being done by the staff and the inordinate amount of time and energy spent tracking down owners for licensing. Deputy Secretary Lermond added that the VRC gives an owner 30 days to get fingerprinted if an application and payment has been otherwise received.

During the discussion of the Racing Summit Working Group Meeting #1, Mr. Harrison informed the Commission that the first working group meeting #1 would be held on June 25, 2009 at 9:00 a.m. in Fredericksburg and that a basic outline had been distributed to individuals and interested parties via e-mail. The objective of the meeting is to take the initial steps towards focusing attention on the issues that are specific to improving Virginia Racing. Chairman Burnett mentioned that the horseplayers, the bettors, should be added to the stakeholders list. Mr. Petramalo directed our attention to the website of the National Horseplayers Association.

Ian Stewart, President of Colonial Downs stated that the live meet opened on Friday, June 5th, and through nine days, attendance was up a little over 15% or almost 200 people per day, live wagering handle at the track is up almost 5%, and simulcast handle at the track is up 69% - a number heavily impacted this year by wagering on the Belmont stakes. Out-of-state handle is down 19%, however, primarily due to the actions of the 18 TrackNet racetracks not carrying the Colonial signal. Entries-per-race are averaging 10.8 and starters-per-race 8.9. Racing Secretary Tyler Picklesimer added that he was pleased with the changes made this season relating to naming riders and scratch times as well as the coupling rule. Daryl Wood stated that race track attendance for Belmont Stakes day was 3,000 and that Fan appreciation Day, held at the beginning of the meet this year, swelled to 3,400. Commissioner Brown applauded him on his radio advertising. Commissioner Reynolds asked Mr. Picklesimer if he attributed the rise in starters-per-race to the Maryland situation (shortening their meet). Tyler acknowledged it did and added that the MD horsemen are more acclimated to not having a horse van available to them as they had prior to 2008. Mr. Petramalo said that the VHBPA is offering a bonus for horses that run on the dirt in claiming races of \$10,000 or lower: the winning trainer gets \$200, 2nd is \$100, 3rd is \$75 and everyone else receives \$50.

Prior to the discussion of the TwinSpires Best Offer, Standardbred representative Jerry Canaan stated that they formally join the best offer put forth by Colonial Downs and the HBPA. The Commission then ratified its June 1, 2009 order with respect to the TwinSpires temporary license. The motion was made by Vice Chairman Miller and seconded by Chairman Burnett. All were in favor. The motion carried.

Brad Blackwell, representing TwinSpires, argued for a source market fee of 7.2%. He drew our attention to the statute, saying it clearly states that it be ‘the average source market fee being paid by the licensees’ and that the current statute was intended to level the playing field for the ADW providers. He added that in 2008 TwinSpires paid the highest rate of all the ADWs, 8.6%. He said went on record as saying ‘the statute is unconstitutional – It presents a competitive disadvantage to all out-of-state (ADW) providers.’ He said it causes money to be put in the hands of Colonial Downs but drives the other ADW providers to lose money. He claimed that Colonial Downs is ‘actually profiting off the efforts of others...more than the people who are actually putting on the show or incurring the cost of bringing the signals in. He said that TwinSpires parent corporation, Churchill Downs, owns 4 racetracks and that TwinSpires does not have, as claimed by Colonial Downs, ‘a competitive advantage in terms of leveraging and negotiating.’ He added, “It’s either you agree to what Colonial Downs wants or you don’t get a license.” He made the point that Colonial’s EZ Horseplay ADW entity has been paying a lower source market fee than anyone else in the marketplace. He continued, “They’ve not wanted us in the state...we’re not welcomed in the state to make money.” He said the only reason TwinSpires is not under contract with Colonial Downs ‘is because we haven’t been able to reach an agreement with Colonial Downs and Colonial Downs has no incentive to have a contract with us.’ He gave an example of TwinSpires customers in VA wagering on Santa Anita: Santa Anita charges a host fee of 8.5%. Colonial Downs a source market fee of 10%. One percent goes to the VA Breeder Fund and a half of a percent to the Virginia Racing Commission. The fees total 20%. The take-

out (retainage or commission) on Santa Anita betting pools averages 20% therefore there is no profit. He said, “TwinSpires makes zero money and in some cases may lose money on carrying races and we cannot conduct business.” He added the statute, “Eliminates all competition in the marketplace and sets up an in-state provider to have a monopoly in the state. We’ll operate in other states but we cannot operate in VA.”

Jim Weinberg spoke for Colonial Downs. He argued for their best offer of 9.15%. He said it was important to ‘try to see the big picture.’ He said, in the last two years, “The landscape of racing, and particularly account wagering, has changed dramatically.” He added, “The host fees are going up...One can see that as host fees go up, source market fees go down. That’s the math.” He discussed TrackNet Media, a joint venture between Churchill and Magna Entertainment that represents 18 tracks and whose “host fees are going up dramatically with the consequence that more revenue from account wagering is flowing to Churchill Downs than it was (before those host fees went up). So, dollars (which) were once in VA to support purses and the operations of a live racetrack which makes possible account wagering in VA” are now flowing in the opposite direction. “More revenue is leaving VA and going to Churchill.” He said, “The legislation cured the defect of the complaint raised by TwinSpires that ADW providers had to, quote, negotiate with a competitor...There’s no longer a contract being set in the legislation.” He added that, “the General Assembly had numerous hearings and numerous opportunities to be heard...open to the public.” He mentioned that, “TrackNet and TwinSpires share a common corporate parent and there is a negotiating posture between those two entities that affect the whole picture in VA. They control 18 tracks, which control about a quarter of all ADW dollars wagered in the US.” With respect to constitutionality he said, “An administrative agent like the Commission does not look at constitutional issues. It is a division of power issue, separation of power issue. Courts are the only part of the government that is empowered to look at constitutional issues.” He added, “There is no distinction in the new statute between in-state and out-of-state ADW providers. Everyone pays the same source market fee...Colonial Downs is paying it to itself.” He said that TwinSpires’ assertion that Colonial Downs does not want it in the Commonwealth is inaccurate. He argued that the 9.15 ‘is fair because it represents an average between a source market fee that would exist but for the host fees that have been increased and what the statute provides going forward.’

Ian Stewart contended that, “TrackNet Media and its out-of-state horsemen want more money. The way they’re going to do it is by paying Colonial Downs and the VA horsemen less money. TrackNet wants more and they think VA should take less.” He said that over \$60 million was spent by Colonial Downs to open the racetrack and at the time ADW was only in its infancy and, “The reason we are here this morning is the producer and its partners who have a significant portion of the wagering in this country want to raise prices to their distributors and retailers...The issues with TwinSpires and XpressBet are pretty simple – They’re affiliates of TrackNet and their TrackNet related host fees are intercompany charges from their own parent company. Increases in host fees from TrackNet tracks are increases in intercompany charges. For TwinSpires and XpressBet to argue that they can’t afford to pay source market fees in VA because the intercompany host fees are increasing is like Colonial Downs saying it can’t make any

money in the OTBs because they decided to charge each one of them a management fee.” He added that TVG and Youbet are caught in the middle by increased host fees from TrackNet and increased source market fees Colonial Downs but ‘there should be enough to go around for everybody.’ Responding to a question from Commissioner Reynolds, Mr. Stewart said that, “Everybody is going to have to give a little.” Vice-Chair Miller said, “But the legislature has eliminated negotiating because the 11 ½% is cast in stone.” To which Mr. Stewart said, “We could do some kind of an arrangement in which they pay the statutory rate and were rebated a certain amount from us.” Vice-Chair Miller asked this clarifying question, “The passage of this act gives you the ability to discriminate by and between ADW providers insofar as the amount of money that Colonial Downs takes. As long as they pay the 1 ½% you can make a deal and contravene the total 11 ½% by giving a break to company A or B?” Mr. Stewart answered, “I certainly can say to company A, pay me the 10% and I will give you back 2%.”

Mr. Weinberg, responding to a question from Vice-Chair Miller said that it was his expectation that the ADW companies are required to pay a source market fee beginning July 1, 2009, of 10% whether or not they have a current contract stating a lower rate. Greg Scoggins stated Xpressbet’s opposing view – the rates currently stipulated in the contracts take precedence until the contract expiration. He added that he, “Was aware of a letter sent to the Governor at the time he was considering the bill that all 4 (out-of-state) ADWs signed encouraging the governor not to sign the bill...”

Chairman Burnett expressed concern about the Commission possibly becoming a participant in determining the competitive playing field among the parties of somehow getting ‘entangled in the marketplace in a way the regulators should not.’ Mr. Weinberg countered that, “You are there today – that’s exactly what you do.” Chairman Burnett said, “I am troubled by the fact that the 10% may not be the 10%.” Commissioner Reynolds posed a question on the Commission’s involvement in the new legislation. Vice-Chair Miller added that the VRC did participate ‘a little further.’ He added that, “Every administrative agency has input into legislation that passes because the governor’s office solicits comments from the agency affected as to what affect this legislation may have on that agency....we did advise the governor’s office of what we felt the impact of this bill might be but again nothing happened.”

Chairman Burnett made a distinction between importing racing states like VA and exporting (year-round racing) states like NY. He said, “It’s an imperfection in that this host fee model penalizes those that don’t run year-round that have to pay a lot of money for a host fee to import it and don’t have the offsetting income from selling their host fee at the track. This issue of leveraging troubles me.” He wondered, “Is VA a place where we’re going to get the label as of July 1 as having the highest source market fees in the country?” Mr. Petramalo said that the majority of states ‘have no regs whatsoever with regard to source market fees or even ADWs.’ Commenting on the market-area in VA he said, “If you draw a circle 25 miles around Colonial Downs you’d find rabbits and trees and nobody else.” He said that he felt TwinSpires is welcome here and that, “As of July 1st the Racing Commission is out of the business of regulating rates.” Chairman Burnett

responded, “We’re being asked to enforce them for you.” With respect to leverage Mr. Petramalo said, “As of July 1st, our leverage is 10%. As Ian pointed out, that’s – in my view – negotiable.” Mr. Blackwell said, “Colonial Downs is alienating itself from the rest of the industry and...pricing themselves out of the market.” He voiced that Colonial Downs wouldn’t negotiate with TwinSpires but may be willing to cut a deal with Youbet and added that Colonial Downs too has increased its host fees. Responding to a question from Commissioner Reynolds he said TwinSpires is currently paying a VRC-ordered 8.3% source market fee.

Scott Daruty, president of the TrackNet Media Group spoke in favor of the TwinSpires best offer. He clarified that TrackNet represents Churchill-owned and Magna-owned tracks but also some independent race tracks. He gave a brief history of ADW in North America. – How it began with TVG and how TVG sold their content to Youbet and how exclusivity at TVG colored host and source market fees. He said the current CA model allows ADWs to retain 10% but that CA accounts for 50% of all ADW activity. He said that, “Colonial Downs got the law passed in VA that would leave 1 ½% host fees for our 18 racetracks. That is not acceptable to us...It’s got to be a two-way street. So, we’re open to working with Colonial Downs.” He acknowledged that host fees are going up. Mr. Daruty questioned the factual accuracy of the Colonial Downs spreadsheet, “Not even close to accurate. These are not the rates.” He said that TrackNet’s primary issue is the rate their 18 racetracks are going to be able sell into this (VA) marketplace.

Mr. Scoggins said that one of their options is to not offer racing from states with low take-out (less than 20%) such as CA and NY to their VA customers – this means that CA and NYRA lose market.

Jerry Canaan, representing the harness horsemen said, “I adopt the comments of Ian and Jim and Frank.”

Responding to a comment by Mr. Stewart wherein Mr. Stewart said it was unacceptable to him ‘that host market fees are set in stone and so VA has to take less’ Mr. Daruty suggested phone calls be placed to the horsemen in CA, FL and KY asking them if they’ll accept a lower host fee rate. Mr. Stewart reiterated that ‘at the end of the day everybody is going to have to give a little’. Mr. Daruty then made the distinction between national ADW companies (TVG, Youbet et al) and regional ADWs (EZHorseplay) - the regionals only take wagers from players in their own state. He acknowledged that host fees had gone up last year by 2% and may have caused ‘sticker-shock.’ Mr. Weinberg countered that five years ago Americatab and Youbet made the same arguments about losing money here in VA and leaving the state but both remained. He added, “All we are doing is setting a baseline.” Responding to a question from Commissioner Reynolds, Mr. Weinberg said, “...if you look at TVG, for example, when we began this process, what ADW providers were paying. That’s where the 10% came from.” Vice-Chair Miller led a discussion of the most favored nation clause contained in some of the ADW contracts with Colonial Downs. Mr. Scoggins said that since

XpressBet was the first in the market and didn't know where ADW rates were going they'd needed the protection of a most-favored-nations clause.

Vice-Chairman Miller expressed his, "deep disappointment with the VA legislature, that they didn't take the effort in passing this statute that's going to have such a great affect on the future of racing in VA, they didn't take the time and they didn't take the effort apparently...I can't believe they passed a bill of this impact with so little exploration of the facts..."

After a short recess Commissioner Brown said, with respect to the TwinSpires/Colonial Downs Best Offer, we needed to do what's best for VA Racing and, "I agree a little bit with Vice-Chair Miller that I don't think things were well thought out in a lot of instances." Vice Chair Miller said, "We can only chose between two numbers...I would choose neither if I could." Commissioner Reynolds said, On a broader perspective, I'm disappointed in the way this whole thing went in the legislative process, and the amount of what I know about this legislation that was passed by the legislature and signed by the Governor....I don't think I have anything in my records – a discussion of a 10% rate." Chairman Burnett added, "The troubling part is that 10% isn't really 10%. We're left to speculate what that number will be." Vice Chairman Miller made a motion for the imposition of the rate of 7.2% as the source market fee for the duration of the temporary license. The motion was made by Commissioner Miller and seconded by Commissioner Reynolds. All were in favor. The motion carried.

During the update of the Thoroughbred 100% bonus, Glen Petty of the Virginia Thoroughbred Association informed the Commission that so far \$93,000 has been paid out. Over the same period last year, the first ten days of the met, winners were only paid \$136,000. Mr. Lermond added that, "The preference given to VA-bred horses is really a nice advantage...the VA-bred horses don't have to worry about being excluded."

There being no further business, July 15th was set as the date of the next meeting to be held at the Horsemen's Building, Colonial Downs, 10700 Horsemen's Road, New Kent, VA. It was moved, seconded, and carried to adjourn this June, 2009 monthly meeting of the Commission.